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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision:13.01.2020

\+ CRL.REV.P. 536/2017 & Crl.M.A. 11828/2017, 18812/2017 & 19833/2017

OIS ADVANCED TECHNOLOGY PVT LTD ..... Petitioner

Through Mr.Akhil Sibal, Sr. Adv. with Mr.Avneesh Arputham & Mr.Shantanu, Advs.

versus

STATE NCT OF DELHI ..... Respondent

Through Mr.Hirein Sharma, APP for State. SI Data Ram IGIS Crime Branch.

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (ORAL)

1. The present petition is filed under sections 397 read with sections 401 and 482 of the Code of Criminal Procedure, 1973 against the order dated 12.07.2017 passed by learned CMM, Patiala House Courts, Delhi.

2. Facts of the case as stated in the present petition are that petitioner company is a private limited company incorporated as such under the provisions of the Indian Companies Act. Present petition has been filed by

the authorized representative of the company namely Nirmal Ramawat, Accounts Manager, who has been duly authorized vide board resolution dated 28.03.2016.

3. As alleged in the present case that Member Central Board of Direct Taxes (CBDT) vide their letter dated 12.05.2016 addressed to the Defence Secretary, MOD, officially informed them that investigation wing of the Income Tax Department at Delhi had come across photocopies of some classified documents. A search and seizure action under Section 132 of the Income Tax Act, 1961 was carried out on 27.04.2016 in the case of the OIS group of companies, Mr. Sanjay Bhandari and other connected cases. One of the premises covered u/s 132 of the Act was A-341, First Floor, Defence Colony, New Delhi. This was a residential premise occupied by Sh. Ashok Shankar, allegedly a close associate of Sanjay Bhandari and also the Director of some of the OIS group of companies, namely Santech Petro Global Private Limited and Santech Infrastructure Private Limited.

4. It is further alleged that examination of the seized documents resulted in the recovery of some photocopies of documents of Ministry of Defence, Government of India marked *'Secret'* and '*confidential'*. Details of the alleged secret and confidential documents may be found in the FIR.

5. Accordingly, the Ministry of Defence Vide MoD I.D. No. 01/TS/AS(J)2016 dated 30.08.2016, addressed to CISC, HQ IDS and verbal/telephonic Instructions thereon had issued HQ to file an FIR in the case. Accordingly, a case FIR No.173/2016 was registered at Police Station Parliament Street for the offences punishable under section 3 & 5 of the Official Secrets Act. The investigation of the case later on was transferred to the Crime Branch. During the investigation, an application was filed by the Investigating officer seeking issuance of Non-bailable warrants against accused Sanjay Bhandari. Accordingly, Ld.Trial Court vide order dated 23.12.2016, issued NBWs and fixed the case on 11.01.2017. The Investigating officer moved another application before the Trial Court seeking issuance of open ended warrants against said accused so that a Red corner notice could also be opened by CBI, then Trial Court vide order dated 04.01.2017 allowed the application. On 11.01.2017, IO submitted a report stating that the accused could not be traced despite having carried out raids at various places in Delhi and Haryana and further requested initiation of proceedings under Section 82 Cr.P.C. After considering the said request, learned Trial Court issued process under Section 82 Cr.P.C. against accused Sanjay Bhandari which was to be executed through the IO with the direction

to execute the said process as per its mandate and ensure the presence of the process server along with the report on 28.02.2017. It was further directed that besides execution of process through normal course, proclamation proceedings against the accused were to be published in an English daily (Hindustan Times) as well as in a Hindi Newspaper having local circulation over the areas in Delhi and Haryana. Accordingly, investigating officer after issuing the proclamation, moved an application before the Ld. Trial Court seeking issuance of process under Section 83 Cr.P.C., which was allowed vide order dated 1.03.2017.

6. Mr. Akhil Sibbal, learned senior counsel appearing on behalf of the petitioner submits that the process server was not present on the said date and no order under Section 82 Cr.P.C. was passed against the accused. Thereafter, Investigating officer attached and seized two vehicles belonging to the Petitioner Company, being an Audi Q7 bearing registration no. DL 03 CBM 0351 and a BMW 7 series bearing registration number DL 04 CNE 5400. Further, several bank accounts belonging to the petitioner company were also frozen on the directions of the Investigating officer. Moreover, Investigating officer filed a report with respect to the process under Section 83 Cr.P.C., wherein he stated that he was still in process of identification of

properties belonging to accused Sanjay Bhandari and he sought further time for the same. Thereafter, he further gave details of the partial attachment carried out by him. The Trial Court vide order dated 24.03.2017, extended the process under Section 83 Cr.P.C. and sought a detailed report in this regard on 18.04.2017. On the said date, petitioner company moved an application under Section 84 Cr.P.C. seeking release of the properties wrongly attached by the Investigating Officer. Thereafter, an application also came to be filed on behalf of the Kotak Mahindra Prime Ltd. under Section 451 Cr.P.C. seeking release of the two vehicles to them on superdari. The bank sought repossession of the vehicles since allegedly been hypothecated to the bank in lieu of a loan, which had not been paid. The Ld Trial Court vide the impugned order dismissed application filed by the Petitioner and further allowed the application filed by Kotak Mahindra Prime Ltd.

7. It is further submitted, it is not the case of the police that Petitioner company was involved in the instant FIR. However, Trial Court has decided the application vide the impugned order without dealing with the issue of wrongful attachment of bank accounts.

8. Learned senior counsel further submits that impugned order is contrary to the settled principles of company law that a company has distinct legal entity from its shareholders. The principle of separate legal entity of a company forms the bedrock of company law jurisprudence in India and around the world and has been entirely disregarded in the impugned order.

9. Moreover, as per section 83 of Cr.P.C., where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that person in relation to whom the proclamation is to be issued – (a) is about to dispose of whole or any part of his property, or (b) is about to remove whole or any part of property from local jurisdiction of the Court, it may order the attachment simultaneously with the issue of the proclamation. Such order shall authorise attachment of any property belonging to such person within the district in which it is made and it shall authorise attachment of any property belonging to such person out of such district when endorsed by the District Magistrate within whose district such property is situate.

10. Learned senior counsel submits that in the present case, the company is not an accused and property in question belongs to petitioner company, therefore, learned court below has illegally passed an order by attaching property of the petitioner company. Moreover, as per section 83 of Cr.P.C.,

the Court issuing a proclamation under Section 82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person. However, in the present case, no such reasons have been recorded in the impugned order.

11. To strengthen his arguments, learned senior counsel has relied upon the case of ***Tata Engineering And Locomotive Co. Ltd. vs. State of Bihar & Ors.*** and batch matters: AIR 1965 SC 40 decided by the Constitutional bench of the Hon'ble Supreme Court whereby it was observed as under:

> *"The true legal position in regard to the character of a corporation or a company which owes its incorporation to a statutory authority, is not in doubt or dispute. The corporation in law is equal to a natural person and has a legal entity of its own. The entity of the corporation is entirely separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members or shareholders is limited to the capital invested by them; similarly, the creditors of the members have no right to the assets of the corporation. This position has been well-established ever since the decision in the case of Salomon v. Salomon & Co. (1) was pronounced in 1897; and indeed, it has always been the well- recognised principle of common law. However, in the course of time, the doctrine that the corporation or a company has a legal and separate entity*

of its own has been subjected to certain exceptions by the application of the fiction that the veil of the corporation can be lifted and its face examined in substance. The doctrine of the lifting of the veil thus marks a change in the attitude that law had originally adopted towards the concept of the separate entity or personality of the corporation. As a result of the impact of the complexity of economic factors, juridical decisions have sometimes recognised exceptions to the rule about the juristic personality of the corporation. It may be that in course of time these exceptions may grow in number and to meet the requirements of different economic problems, the theory about the personality of the corporation may be confined more and more."

12. Learned senior counsel submits that it has always been the well-recognised principle of common law, however, in the course of time, the doctrine that the corporation or a company has a separate legal entity of its own, has been subjected to certain exceptions by application of the principle that the veil of the corporation can be lifted and its face examined in substance. The 'doctrine of the piercing of corporate veil' thus marks a change in the attitude that law had originally adopted towards the concept of the separate entity or personality of the corporation. As a result of impact of the complexity of economic factors, juridical decisions have sometimes recognised exceptions to the rule about juristic personality of the corporation.

13. The Hon'ble Supreme Court in the case of ***Balwant Rai Saluja & Anr. vs. Air India Limited & Ors.: (2014) 9 SCC 407*** has observed and held as under:

> *"70. The doctrine of 'piercing the corporate veil' stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders with its own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation. The starting point of this doctrine was discussed in the celebrated case of Salomon v. A Salomon & Co Ltd., [1897] AC 22. Lord Halsbury LC (paragraphs 31–33), negating the applicability of this doctrine to the facts of the case, stated that:*
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> *"...a company must be treated like any other independent person with its rights and liabilities legally appropriate to itself ..., whatever may have been the ideas or schemes of those who brought it into existence."*
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> *Most of the cases subsequent to the Salomon case (supra), attributed the doctrine of piercing the veil to the fact that the company was a 'sham' or a 'façade'. However, there was yet to be any clarity on applicability of the said doctrine.*
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> *71. In recent times, the law has been crystallized around the six principles formulated by Munby J. in Ben Hashem v. Ali Shayif, [2008] EWHC 2380 (Fam). The six principles, as found at paragraphs 159– 164 of the case are as follows- (i) ownership and control of a company were not enough to justify piercing the corporate veil; (ii) the Court cannot pierce the corporate veil, even in the absence of third party interests in the company, merely because it is thought to be necessary in the interests of*

justice; (iii) the corporate veil can be pierced only if there is some impropriety; (iv) the impropriety in question must be linked to the use of the company structure to avoid or conceal liability; (v) to justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is use or misuse of the company by them as a device or facade to conceal their wrongdoing; and (vi) the company may be a 'façade' even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The Court would, however, pierce the corporate veil only so far as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done.

74. Thus, on relying upon the aforesaid decisions, the doctrine of piercing the veil allows the Court to disregard the separate legal personality of a company and impose liability upon the persons exercising real control over the said company. However, this principle has been and should be applied in a restrictive manner, that is, only in scenarios wherein it is evident that the company was a mere camouflage or sham deliberately created by the persons exercising control over the said company for the purpose of avoiding liability. The intent of piercing the veil must be such that would seek to remedy a wrong done by the persons controlling the company. The application would thus depend upon the peculiar facts and circumstances of each case.

80. The present facts would not be a fit case to pierce the veil, which as enumerated above, must be exercised sparingly by the Courts. Further, for piercing the veil of incorporation, mere ownership and control is not a sufficient ground. It should be established that the control and impropriety by the Air India resulted in depriving the Appellants-workmen herein of their legal rights. As regards the question of impropriety, the Division Bench *of the High Court of Delhi in the impugned order dated 02.05.2011, noted that there has been no advertence on merit, in respect of the workmen's rights qua HCI, and the claim to the said right may still be open to the workmen as per law against the HCI. Thus, it cannot be concluded that the controller 'Air India' has avoided any obligation which the workmen may be legally entitled to. Further, on perusal of the Memorandum of Association and Articles of Association of the HCI, it cannot be said that the Air India intended to create HCI as a mere façade for the purpose of avoiding liability towards the Appellants-workmen herein."*

14. He further relied upon the case of ***G. Sagar Suri vs. State & Anr.: 2004 Cri LJ 212*** whereby held that *"Section 83 enjoins upon the court to record the reasons in writing for ordering the attachment of any property belonging to the person who has been proclaimed as an offender under Section 82 Cr.P.C. Even the order of attachment of property has two pre-requisites. Firstly the court has to satisfy itself either by affidavit or otherwise that the person in relation to whom the proclamation is to be issued is about to dispose of whole or any part of the property or secondly that he is about to remove whole or part of the property from the local jurisdiction of the court. Thus the orders passed by learned MM in this regard suffer from gross illegality and inherent infirmity."*

15. In the case of ***Kishori Devi vs. State of Bihar & Anr.: 1995(2) BLJR1430*** decided by High Court of Patna, Ranchi, whereby held that

"Section 83 as noticed above, contemplates that both movable or immovable properties can be attached, which belongs to be a 'proclaimed person'. The word 'belonging to the proclaimed person', in my opinion cannot be given wider sense by including the property of the family members also." Thus, the impugned order deserves to be set aside.

16. Learned APP appearing on behalf of the State/respondent submits that M/s OIS Advanced Technology Pvt. Ltd is a shell company or the company which has been incorporated for the beneficial interest of accused Sanjay Bhandari as 90 percent share of the said company is with Sanjay Bhandari and rest of 10 percent share belongs to Sonia Bhandari, wife of Sanjay Bhandari. Investigation in the present case is going on and it has been found that M/s OIS Advanced Technology Pvt. Ltd was a front of a company whereby the illegal activities of the accused were being carried out. On account of the miscellaneous applications filed by the petitioners, the process under Sections 82/83 Cr.P.C. against accused could not be completed and accused Sanjay Bhandari has also yet not been declared proclaimed offender.

17. I note, learned counsel on behalf of M/s Kotak Mahindra Prime Limited before the Trial Court submitted that it is not disputed fact that

Sanjay Bhandari had absconded and the property was on hypothecation of the bank. The bank's money was involved in the case and they have obtained orders from the Court of ld. ADJ and that being the situation, their right should not be prejudiced and application under Section 451 Cr.P.C. should be adjudicated and property be given on superdari to them.

18. It is not in dispute that property/cars belonging to M/s OIS Advanced Technology Pvt. Ltd. and registered in the name of company M/s CIS Advanced Technology Pvt. Ltd., being a corporate entity, does not in any manner mean that it is distinct than that of Sanjay Bhandari, who is absconding accused. While passing impugned order, learned Trial Court has given two reasons; firstly, majority shareholding belongs to Sanjay Bhandari; secondly, it is a private limited company and the word 'belonging to' under Section 83 Cr.P.C. is of widest amplitude. Even if the fact that the cars should not have been attached is excluded, then the shareholding of the company would have to be attached and in that scenario, the company would by itself become dysfunctional because 90 percent of the shareholding in the company would have been attached. Apart from that, there is also an established doctrine of lifting the corporate veil. The further fact that Corporate Entity was used to perpetuate the illegal activities of the

absconding accused person is also a factor to be borne in mind. Under Section 84 Cr.P.C., the objection has to be filed by any person other than the proclaimed person.

19. Accordingly, learned Trial Court noted that the company's name in the resolution, bears name of Micromet ATI Pvt. Ltd. though in the bottom of the page, bears the name of M/s OIS Advanced Technology Pvt. Ltd. For reference, Section 84 Cr.P.C. is reproduced as under:

> "***Section 84 Cr.P.C. : Claims and objections to attachment***
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> *(1)* If any claim is *preferred to, or objection made to the attachment of, any property attached under section 83, within six months from the date of such attachment, by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property, and that such interest is not liable to attachment under Section 83, the claim or objection shall be inquired into, and may be allowed or disallowed in whole or in part:*
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> *Provided that any claim preferred or objection made within the period allowed by this Sub-Section may, in the event of the death of the claimant or objector, be continued by his legal representative.*
>
> *(2) Claims or objections under Sub-Section (1) may be preferred or made in the Court by which the order of attachment is issued, or, if the claim or objection is in respect of property attached under an order endorsed under Sub-Section (2) of Section 83, in the Court of the Chief Judicial Magistrate of the district in which the attachment is made.*

(3) Every such claim or objection shall be inquired into by the Court in which it is preferred or made:

Provided that, if it is preferred or made in the Court of a Chief Judicial Magistrate, he may make it over for disposal to any Magistrate subordinate to him.

(4) Any person whose claim or objection has been disallowed in whole or in part by an order under Sub-Section (1) may, within a period of one year from the date of such order, institute a suit to establish the right which he claims in respect of the property in dispute; but subject to the result of such suit, if any, the order shall be conclusive."

If the language of Section 84 Cr.P.C. is read, the application has been filed by the accused himself and the language that *"by any person other than the proclaimed accused person"* precludes such an application *per se*.

20. Accordingly, considering the share holding in the company of M/s OIS Advanced Technology Pvt. Ltd., the Trial Court found no merit in the plea of the petitioner that the company is a distinct corporate entity, separate from the individual and the property whereof cannot be attached. That being the situation, learned Court below was not inclined to set aside the order/ recall the order of attachment of properties of the company M/s OIS Advanced Technology Pvt. Ltd. Simultaneously, the Trial Court also found no grounds for releasing vehicles - Audi Q7 and BMW 7 Series in favour of M/s OIS Advanced Technology Pvt. Ltd.

21. Learned Trial Court also observed that hire purchase agreement means that property is given on hire by the registered owner, subject to the understanding that upon completion of hire/liquidation of the hire charges, the said property shall be transferred by the registered owner. It is only an agreement, that only upon completion of the hire charges paid by the person to whom the property has been given, the legal right/ title in the property shall pass. Accordingly, Kotak Mahindra Prime continues to be the registered owner even during the pendency of the hire purchase transaction. Said company is also a distinct person/ a separate entity than the Bhandaris or OIS AT Pvt. Ltd.

22. It is not in dispute that the property belongs to the company mentioned above.

23. As argued by learned APP and as found during investigation that the companies are shell companies and no business has been carried out through these companies. Though as per section 83 of Cr.P.C., the attachment can be ordered of any property belonging to such persons means the accused therein. In the present case, the chargesheet has not been filed, therefore, at this stage, it cannot be concluded that the company is not made an accused.

24. It is pertinent to note, even otherwise, in a case, if any person incorporated a company and purchased or transferred all properties in the name said company and thereafter leaves the country. However, while staying in abroad, he can operate the company through authorised representatives and enjoy the proceeds of same. In that eventuality, when 100% shares of the company are with an accused, proceedings under Section 82 & 83 Cr.P.C. can be initiated and executed and in my considered opinion, the property of such company can be attached. The proposition of law as argued by learned senior counsel appearing on behalf of the petitioner is applicable only in cases, where there are different shareholders and company is doing business, but in the present case 90% shares belongs to accused Sanjay Bhandari and 10% to his wife. Thus, it is a private limited company, being run by the same family only but without conducting any business, transactions, only owning properties in the name of the company. Without any business but having property, in that situation, the Trial Court has rightly lifted the corporate veil of the company and accordingly, the applications moved by the petitioner have been dismissed.

25. In the case of ***Balwant Rai Saluja (supra),*** the Constitution Bench of the Hon'ble Supreme Court held that the doctrine of piercing the corporate

veil of a company allowed the Court to disregard the separate legal personality of a company and impose liability upon the persons exercising real control over the said company. However, this principle has been and should be applied in a restrictive manner, that is, only in scenarios wherein it is evident that the company was a mere camouflage or sham, deliberately created by the persons exercising control over the said company for the purpose of avoiding liability. The present case falls under the same circumstances, thus, I find no illegality and perversity in the order passed by the court below.

26. Finding no merit in the present petition, the same is, accordingly dismissed.

27. Interim order stands vacated.

28. Pending applications stand disposed of.

(SURESH KUMAR KAIT)
JUDGE

JANUARY 13, 2020
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